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No. 84-5872

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

Roy E. Daniels,

Petitioner,

v.

Andrew Williams,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR RESPONDENT

JAMES WALTER HOPPER
Dennis Alan Barbour
Gregory Lee Lyons
Gardner, Moss & Hopper, P. C.
629 East Main Street
P. O. Box 1201
Richmond, Virginia 23209
804-643-2500
Counsel for Respondent

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that an injury to a jail inmate's person as the result of an act of simple negligence by a deputy sheriff of the Commonwealth of Virginia is not a protectable liberty interest under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. Whether the Court of Appeals erred in holding that even if such an interest in general exists, or such a deprivation might in general occur, any such deprivation would not be without due process because the Commonwealth provides an adequate post deprivation remedy in the form of a traditional common law personal injury negligence action.

3. Whether the Court of Appeals erred in holding that an adequate postdeprivation remedy was available to a jail inmate who alleged personal injuries resulting from the simple negligence of a deputy sheriff of the Commonwealth of Virginia without reaching the question of whether or not the existence of a possible immunity defense should permit the action to be maintained under 42 U.S.C. § 1983.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv-vi
STATEMENT OF THE CASE	1-2
SUMMARY OF THE ARGUMENT	2-4
ARGUMENT	5-28
I. THE COURT OF APPEALS' DECISION THAT AN INJURY TO A JAIL INMATE'S PERSON AS THE RESULT OF AN ACT OF SIMPLE NEGLIGENCE BY A DEPUTY SHERIFF OF THE COMMONWEALTH OF VIRGINIA IS NOT A PROTECTABLE LIBERTY INTEREST UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS CONSISTENT WITH THIS COURT'S DECISION IN *PARRATT V. TAYLOR*	5-6
II. A PERSONAL INJURY ALLEGEDLY SUFFERED AS A RESULT OF A DEPUTY SHERIFF'S SIMPLE NEGLIGENCE IS NOT A CONSTITUTIONAL DEPRIVATION OF LIBERTY ACTIONABLE UNDER 42 U.S.C. SECTION 1983	7-18
A. Negligent Acts By State Officials Do Not Amount To A Violation Of The Substantive Guarantees Of The Due Process Clause	7-11
B. The Most Logical Interpretation Of Parratt v. Taylor Affirms The Proposition That Something Greater Than Negligence Is Required To Support An Action Under Section 1983 For Denial Of Due Process	12-15

Table of Contents Continued

Page

C. Petitioner's Status As A Jail Inmate Does Not Justify Relaxing The Standard Of Conduct Necessary To Support A Section 1983 Claim 16

D. The Court Is Urged To Clarify The Requirements To Be Met For Stating A Due Process Violation Cognizable Under Section 1983 To Be That The Injury Resulting From State Action Must Be The Result Of Official Action Constituting Something More Than Mere Negligence And That The State Remedy Is Inadequate 17-18

III. THE COMMONWEALTH OF VIRGINIA PROVIDES AN ADEQUATE POST-DEPRIVATION REMEDY FOR THE ALLEGED NEGLIGENT DEPRIVATION OF PETITIONER'S LIBERTY INTEREST NOTWITHSTANDING THE DOCTRINE OF SOVEREIGN IMMUNITY 19-25

IV. EVEN IF THE SOVEREIGN IMMUNITY DEFENSE IS AVAILABLE IN THE PRESENT CASE, THE DEFENSE IS NOT WHOLLY ARBITRARY OR IRRATIONAL WITHIN THE CONTEXT OF THIS CASE 26-27

V. CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES:

Allen v. McCurry, 449 U.S. 90 (1980) 7

Augustine v. Doe, 740 F.2d 322 (5th Cir. 1984) 12, 19

Baker v. McCollan, 443 U.S. 137 (1979) ..... *passim*

Black v. Stephens, 662 F.2d 181 (3d Cir. 1981), *cert. denied*, 455 U.S. 1008 (1982)..... 14

Chesapeake & Ohio Railway Co. v. Butler, 179 Va. 609, 20 S.E.2d 516 (1942) 21

Daniels v. Williams, 720 F.2d 792 (4th Cir. 1983), *aff'd on other grounds on rehearing en banc*, 748 F.2d 229 (4th Cir. 1984) *cert. granted* (February 19, 1985) 21

Daniels v. Williams, 748 F.2d 229 (4th Cir. 1984) *cert. granted* (February 19, 1985) 5, 12, 19

Davidson v. O'Lone, 752 F.2d 817 (3d Cir. 1984) (en banc), *cert. pending* (filed March 29, 1985)..... *passim*

Elder v. Holland, 208 Va. 15, 155 S.E.2d 369 (1967) 28

Estelle v. Gamble, 429 U.S. 97 (1976) ..... *passim*

Frazier v. Collins, 544 F. Supp. 109 (E.D. Va. 1982)..... 20

Gilmere v. City of Atlanta, 737 F.2d 894 (11th Cir. 1984)..... 12, 19

Groves v. Cox, 559 F. Supp. 772 (E.D. Va. 1983) ... 20

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 27, 28

Haygood v. Younger, 718 F.2d 1472 (9th Cir. 1983)..... 12

Hinchey v. Ogden, 226 Va. 234, 307 S.E.2d 891 (1983) 26

Table of Authorities Continued

Page

Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973)..... 24

Holmes v. Wampler, 546 F. Supp. 500 (E.D. Va. 1982)..... 20

Hudson v. Palmer, 468 U.S. ____, 82 L.Ed.2d 393 (1984) ..... *passim*

Ingraham v. Wright, 430 U.S. 651 (1977)..... 11

Irshad v. Spann, 543 F. Supp. 922 (E.D. Va. 1982)..... 20

Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983)..... 12

Logan v. Zimmerman Brush Co. 455 U.S. 422 (1982) 14, 22

Martinez v. California, 444 U.S. 277 (1980) 22, 23, 25

Messina v. Burden, 228 Va. 301, 321 S.E.2d 657 (1984) 27

Mills v. Smith, 656 F.2d 337 (8th Cir. 1981) 12

Monroe v. Pape, 365 U.S. 167 (1961)..... 7, 8

Parratt v. Taylor, 451 U.S. 527 (1981) ..... *passim*

Paul v. Davis, 424 U.S. 693 (1976) ..... *passim*

Procunier v. Navarette, 434 U.S. 555 (1978) 7, 10, 25

Roy v. City of Augusta, Maine, 712 F.2d 1517 (1983) 18

Screws v. United States, 325 U.S. 91 (1945) 9

Stokes v. Delcambre, 710 F.2d 1120 (5th Cir. 1983)..... 14

Table of Authorities Continued

Page

Thibodeaux v. Bordelon, 740 F.2d 329 (5th Cir. 1984) 12, 19

Wade v. Haynes, 663 F.2d 778 (8th Cir. 1981), *aff'd on other grounds sub nom. Smith v. Wade*, 461 U.S. 30 (1983) 14

Wakinekona v. Olim, 664 F.2d 708 (9th Cir. 1981), *rev'd on other grounds*, 461 U.S. 238 (1983) 12

Wilson v. Beebe, 743 F.2d 342 (6th Cir. 1984) 12

Wright v. City of Ozark, 715 F.2d 1513 (11th Cir. 1983) 12

CONSTITUTIONAL PROVISIONS:

U. S. Const., Amendment XIV ..... *passim*

STATUTES:

42 U. S. C. § 1983 ..... *passim*

STATEMENT OF THE CASE

The petitioner was an inmate in the Richmond City Jail on January 23, 1982. (J.A. 6). The respondent was a deputy of the Sheriff of the City of Richmond, appointed as such pursuant to Virginia law. The petitioner alleges that on January 23, 1982, while en route to the jail dining hall, he slipped on a pillow that had been left on the stairs by the respondent, the deputy in charge of the building. (J.A. 6). Petitioner brought his action pursuant to 42 U.S.C. § 1983 on a pre-printed form provided at the Richmond City Jail for that purpose, and filed the form with the Clerk of the United States District Court for the Eastern District of Virginia. He indicated on the § 1983 form that he had not begun any other actions in state or federal court dealing with the same facts involved in this action. (J.A. 5).

Petitioner alleged in his suit that he injured his back and ankle. Furthermore, he alleged that although he was examined and treated by a doctor, he suffered back pains at the time the suit was filed. (J.A. 6).

The United States District Court for the Eastern District of Virginia held that petitioner's claim was not actionable under § 1983 since the Due Process Clause required only a meaningful postdeprivation remedy and Virginia law provided such a remedy in the form of a common-law negligence action. (J.A. 20). A panel of the United States Court of Appeals for the Fourth Circuit agreed. (J.A. 31). The court of appeals, however, granted a rehearing *en banc*.

The majority of the court of appeals held that the negligent injury to the petitioner's person was not a protectable liberty interest under the Due Process Clause and his complaint did not state a cause of action under § 1983 on that account (J.A. 35). Furthermore, the court of appeals held that even if petitioner were deprived of a liberty interest protected by the Fourteenth Amendment, the deprivation was not without due process of law under *Parratt v. Taylor*, 451 U.S. 527 (1981), because a postdeprivation remedy was available in the state courts in the

form of a traditional common law personal injury negligence action. (J.A. 36). The *en banc* court did not reach the question of whether the existence of a possible immunity defense should permit the action to be maintained under § 1983. (J.A. 37).

Contrary to the point asserted by petitioner (Brief of Petitioner 3), respondent was not represented in the brief in the court of appeals by the Attorney General of Virginia, and it was not asserted on his behalf that he would rely in both state and federal court upon sovereign immunity. (J.A. 22).

SUMMARY OF THE ARGUMENT

The Court of Appeals properly concluded that this Court's decision in *Parratt v. Taylor* did not establish a cause of action under 42 U.S.C. § 1983 for personal injuries such as those allegedly suffered by petitioner. *Parratt* involved only the negligent loss by prison officials of a prisoner's personal property. Since the petitioner's claim involves an allegation of simple negligence resulting in personal injury, the respondent believes that the limiting language in *Parratt* precludes its application to this case. An extension of *Parratt* to include deprivation of a liberty interest will extend the case beyond its logical bounds.

Should the *Parratt v. Taylor* analysis be applied to liberty interests, respondent believes that something more than mere negligence is required to support a § 1983 claim based on the Fourteenth Amendment's Due Process Clause. The suggestion in *Parratt* that such negligence would be sufficient does not accord with this Court's prior decisions involving § 1983 and has created confusion among the lower federal courts as to the proper way to analyze claims such as petitioner's.

Respondent believes that his alleged actions were *at most* negligent under state law. Such negligence lacks the outrageousness or abuse of official power which respondent believes necessary to raise his conduct to the level of a deprivation of a substantive due process right. Respondent further urges that petitioner's status as a jail inmate

is not a sufficient reason to relax the standards by which such deprivations are judged.

In this case, petitioner has alleged nothing more than a violation of a state law duty of care. If such claims are permitted to reach federal court via the due process arguments advanced by petitioner, respondent believes that much of the separation between state and federal jurisdiction will evaporate, and that § 1983 will create a new body of tort law incompatible with the several states' existing tort law systems.

In the event that this Court determines that the injury to petitioner proximately caused by the alleged negligence of respondent constitutes the deprivation of a liberty interest protected by the Due Process Clause of the Fourteenth Amendment, respondent urges this Court to decide that an adequate postdeprivation remedy provided by state law satisfies the requirements of due process.

Respondent urges this Court to establish a clear rule for determining when a state remedy is adequate. Respondent argues that a state remedy should be deemed adequate and meaningful if state law provides the injured party with the opportunity for a hearing before a court or other tribunal with the power to grant a remedy.

On the other hand, the minimum requirements of procedural due process do not require that the injured party always receive the same compensation in state court that he would have received if he had been allowed to utilize § 1983.

Respondent acknowledges that state law affirmative defenses such as sovereign immunity, contributory negligence, or comparative negligence, and other procedural and substantive rules of state law may prohibit a plaintiff from receiving the same compensation which he might have received if § 1983 had been available to him. However, it is incorrect to argue that a lack of compensation in the state court action invariably means that the state court action is inadequate for purposes of the Due Process Clause of the Fourteenth Amendment.

Respondent urges that the proper analysis of whether a possible affirmative defense makes the state remedy inadequate is to determine whether the affirmative defense is wholly arbitrary or irrational as applied to the case in question. If the use of the affirmative defense in the state court action would result in an arbitrary or irrational conclusion as applied in that case, then the state remedy would be inadequate and the plaintiff would be allowed to proceed with an action in federal court under § 1983. On the other hand, if the affirmative defense rationally furthered a reasonable state interest, then the state cause of action would satisfy the minimum requirements of procedural due process.

Respondent believes that establishing a clear rule regarding the adequacy of a state remedy is important in maintaining the efficiency of the federal judicial system. It is likely that many plaintiffs will still file actions in federal court under § 1983 notwithstanding an available state cause of action if the plaintiffs are able to identify potential state law affirmative defenses which may deny the plaintiffs the same compensation which they would receive under § 1983. The "wholly arbitrary or irrational" test described above would allow the federal courts to efficiently address the adequacy of the available state remedies.

Respondent argues that allowing rationally-based affirmative defenses to limit or proscribe compensation to some plaintiffs in state court actions does not violate the meaning of § 1983 as interpreted by this Court. This Court has ruled that prison officials may claim a qualified, "good faith" immunity in § 1983 cases. While the federal qualified immunity is not a mirror image of the state sovereign immunity, the results are often the same since in both cases some injured plaintiffs are not compensated and some public officials are shielded from liability for their negligent acts or omissions.

Finally, respondent argues that if a state court were to rule that sovereign immunity was available to respondent, sovereign immunity would not be wholly arbitrary or irrational as applied to the facts of this case.

ARGUMENT

I. THE COURT OF APPEALS' DECISION THAT AN INJURY TO A JAIL INMATE'S PERSON AS THE RESULT OF AN ACT OF SIMPLE NEGLIGENCE BY A DEPUTY SHERIFF OF THE COMMONWEALTH OF VIRGINIA IS NOT A PROTECTABLE LIBERTY INTEREST UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS CONSISTENT WITH THIS COURT'S DECISION IN *PARRATT V. TAYLOR*.

The *en banc* opinion in *Daniels v. Williams*, 748 F.2d 229 (4th Cir. 1984), properly held that *Parratt v. Taylor*, 451 U.S. 527 (1981) applied only to a deprivation of property interests and not to a deprivation of liberty interests. *Parratt* involved the negligent loss by state prison officials of a prisoner's "hobby kit" and this Court held only that an inadequate remedy in a state court was a minimum requirement to invoke 42 U.S.C. § 1983. 451 U.S. at 544. The last paragraph of the opinion of the Court in *Parratt* contained the example of an automobile accident involving a state official and concluded that such a case—presumably involving personal injury—is not covered by the Due Process Clause of the Fourteenth Amendment or § 1983. *Id.*

The present case involves an allegation of simple negligence resulting in personal injury. In effect, the only issue setting this case apart from any other common-law type tort case is that the alleged act of simple negligence involved a deputy sheriff of the City of Richmond and an inmate in the Richmond City Jail. This Court limited *Parratt* by not including bodily injuries resulting from negligent actions of state officials. *Parratt*, 451 U.S. at 544.

In a later case, the Court recognized this limitation and chose to extend this reasoning only to include intentional as well as unintentional property interest violations. *Hudson v. Palmer*, 468 U.S. ___, 82 L.Ed.2d 393, 407

(1984). Therefore, at present, given the limiting language in the opinion of the Court, *Parratt* applies only to property interests, and any attempt to include liberty interests extends the case past its logical bounds.

II. A PERSONAL INJURY ALLEGEDLY SUFFERED AS A RESULT OF A DEPUTY SHERIFF'S SIMPLE NEGLIGENCE IS NOT A CONSTITUTIONAL DEPRIVATION OF LIBERTY ACTIONABLE UNDER 42 U.S.C. SECTION 1983.

A. *Negligent Acts By State Officials Do Not Amount To A Violation Of The Substantive Guarantees Of The Due Process Clause.*

Assuming *arguendo* that the *Parratt v. Taylor* analysis applies to liberty interests, petitioner, whose injury allegedly resulted from a deputy sheriff's negligence, has not been deprived of a constitutionally protected liberty interest. A constitutional deprivation "connotes an intentional act denying something to someone, or, at the very least, a deliberate decision not to act to prevent a loss." *Parratt*, 451 U.S. at 548 (Powell, J., concurring). *See also Procunier v. Navarette*, 434 U.S. 555, 568 (1978) (Burger, C.J., dissenting) ("Neither the language nor the legislative history of § 1983 indicates that Congress intended to provide remedies for negligent acts"). Before *Parratt*, this Court had never suggested that mere negligence would support a § 1983 claim.

Section 1983 was enacted in 1871 as one of the statutes intended to implement the Fourteenth Amendment. The Congress was concerned with the influence of the Ku Klux Klan on Southern law enforcement agencies, and possibly other intentional or grossly negligent acts perpetrated by those enforcement officials. *Allen v. McCurry*, 449 U.S. 90, 98 (1980).

Prior to *Monroe v. Pape*, 365 U.S. 167 (1960), § 1983 remained a little known, little-used section of the United States Code, as most civil rights litigation against state officers before that time was brought under 18 U.S.C. § 242, the criminal counterpart to § 1983. *Parratt*, 451 U.S. at 553 n. 13 (Powell, J., concurring); *Davidson v. O'Lone*, 752 F.2d 817, 823 (3d Cir. 1984), *cert. pending* (filed March 29, 1985).

Monroe involved an allegedly illegal (warrantless) search, seizure and detention which the plaintiffs alleged deprived them of their "rights, privileges and immunities secured by the Constitution...." 365 U.S. at 170. The *Monroe* Court held, *inter alia*, that because § 1983, unlike § 242, does not contain the word "willfully," § 1983 plaintiffs need not establish willfulness, which the Court defined as the "specific intent to deprive a person of a federal right." *Id.* at 187. While the officers in *Monroe* may not have intended to deprive the plaintiffs of a federal right, they did—unlike the deputy sheriff in the instant case—intend to commit the specific acts alleged.

While the *Monroe* Court declined to impose the § 242 "willfulness" gloss on § 1983, neither did it suggest that mere negligence by a state official would support a § 1983 claim. Decisions of this Court subsequent to *Monroe* confirm the Court's rejection of the notion that all common law torts committed by public officials acting under color of state law *ipso facto* constitute violations of § 1983.

In *Paul v. Davis*, 424 U.S. 693 (1976), the police circulated the plaintiff's picture, identifying him to area merchants, including his own employer, as an "active shoplifter." 424 U.S. at 694-696. The plaintiff sued under § 1983, alleging that circulation of the picture and accompanying description defamed him by damaging his reputation. Rejecting the plaintiff's contentions, the Court held specifically that the alleged injury to the plaintiff's reputation did not involve a special liberty or property interest invoking Fourteenth Amendment Due Process simply because it was perpetrated by a public official. 424 U.S. at 712. The State's status as an alleged tortfeasor does not, by itself, sustain a § 1983 claim.

> ...[T]he Due Process Clause of the Fourteenth Amendment and § 1983 [do not automatically] make actionable many wrongs inflicted by government employees which had heretofore been thought to give rise only to state-law tort claims....

> [S]uch a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.

Paul, 424 U.S. at 699, 701.

Writing for the Court in *Paul*, Justice Rehnquist relied upon this Court's decision in *Screws v. United States*, 325 U.S. 91 (1945), a case brought under 18 U.S.C. § 242 and involving actions by police officers while making an arrest, where Justice Douglas wrote for the plurality:

> Violation of local law does not necessarily mean that federal rights have been invaded. The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States.

Id. at 108-09 (quoted in *Paul v. Davis*, 424 U.S. at 700).

In a case decided later in the same year as *Paul v. Davis*, the Court reiterated that not all torts of state officials are actionable under § 1983.

In *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), the Court held that medical malpractice does not become a constitutional violation simply because the victim is a prison inmate. The Court concluded that the mistreatment allegedly suffered by the plaintiff constituted nothing more than ordinary medical malpractice, which was actionable only under state law, and not under federal law. *Id.* at 108. In order to state a cognizable claim under § 1983 for malpractice, the Court concluded that "acts or omissions sufficiently harmful to *evidence deliberate indifference* to serious medical needs" would have to be alleged. *Id.* at 106 (emphasis added).

These cases indicate that something more than mere negligence is required to support a denial of due process action under § 1983. Before deciding *Parratt*, this Court

twice granted certiorari expressly to decide this question. Both times, however, the Court found it unnecessary to decide the issue. *Procunier v. Navarette*, 434 U.S. 555 (1978) (defendants entitlement to qualified immunity rendered negligence issue moot); *Baker v. McCollan*, 443 U.S. 137 (1979) (false imprisonment not a deprivation of a constitutional right where officer acted on basis of valid warrant).

Baker, however, is instructive. In discussing what acts would support a § 1983 claim, Justice Rehnquist, again writing for the Court, noted:

> Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles. Just as "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner," *Estelle v. Gamble*, 429 U.S. 97, 106, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976), false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official.

Baker, 443 U.S. at 146.

Nothing in this Court's decisions through *Baker* directly supports the principle that negligent conduct by a state official causing injury to someone constitutes a deprivation of a Constitutional right which can be redressed in a § 1983 suit. In fact, the pre-*Parratt* cases evince the Court's concern that the Fourteenth Amendment and § 1983 not become a "font of tort law to be superimposed" upon the several states' existing tort law systems. *Paul*, 424 U.S. at 701. These cases caution that only violations of Constitutional rights, *not* violations of duties of care imposed by state tort law, are actionable under § 1983. *Baker*, 443 U.S. at 146. *See also Estelle*, 429 U.S. 97, 106.

In order to violate a federal right, official conduct must exceed a minimum level, below "which the Constitution is not concerned." *Ingraham v. Wright*, 430 U.S. 651, 674 (1977). Prior to *Parratt*, simple negligence did not exceed that minimum level, any more than did medical malpractice or defamation. The petitioner's claim is based upon allegations of simple negligence, and Virginia has long provided a forum for trying such claims. Petitioner does not claim that a state official acted with a specific willful intent, or with reckless and deliberate indifference, and he does not allege a violation of a substantive guarantee of the Due Process Clause.

This Court sought in *Parratt* to provide a framework which would assist lower federal courts in analyzing claims, such as petitioner's, which allege facts commonly thought to state a "common law tort [claim] normally dealt with by state courts, but instead [are] couched in terms of a constitutional deprivation and [seek] relief ... under § 1983." *Parratt*, 451 U.S. at 533. *Parratt*, however, has apparently not provided that guidance.

B. *The Most Logical Interpretation Of Parratt v. Taylor Affirms The Proposition That Something Greater Than Negligence Is Required To Support An Action Under Section 1983 For Denial Of Due Process.*

Parratt has created confusion among the Circuit Courts,[1] but two recent decisions support the contention that *Parratt v. Taylor* did *not* reverse the trend of requiring more than simple negligence to invoke due process protection under § 1983. *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983); *Davidson v. O'Lone*, 752 F.2d 817, 835 (3d Cir. 1984). In *Jackson*, a police officer's failure to aid in rescue or to properly direct firemen to an accident scene was alleged to have exacerbated accident victims' injur-

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[1]The Third Circuit, in *Davidson v. O'Lone*, 752 F.2d 817 (3d Cir. 1983), *cert. pending* (filed March 29, 1985), concluded that *Parratt* did apply to liberty interests, but negligence did not invoke constitutional protection. The Fourth Circuit, in *Daniels v. Williams*, 748 F.2d 229 (4th Cir. 1984), *cert. granted* (February 19, 1985), held that *Parratt* does not apply to liberty interests. The Fifth Circuit, in *Thibodeaux v. Bordelon*, 740 F.2d 329, 337 (5th Cir. 1984), held that *Parratt* applies to liberty interests, but in *Augustine v. Doe*, 740 F.2d 322, 327 (5th Cir. 1984), stressed that only "protected interests" require due process protection. The Sixth Circuit, in *Wilson v. Beebe*, 743 F.2d 342, 350 (6th Cir. 1983), held that *Parratt* does not apply to life or liberty interests, but that a substantive violation of a constitutional right would still invoke due process protection. The Seventh Circuit, in *Jackson v. City of Joliet*, 715 F.2d 1200, 1206 (7th Cir. 1983), held that neither negligence nor gross negligence satisfied a due process claim under the Fourteenth Amendment. The Eighth Circuit, in *Mills v. Smith*, 656 F.2d 337 (8th Cir. 1981), held that negligence will not necessarily give rise to a constitutional deprivation. The Ninth Circuit, in *Wakinekona v. Olim*, 664 F.2d 708, 715 (9th Cir. 1981), *rev'd on other grounds*, 461 U.S. 238 (1983), held that *Parratt* does not apply to liberty interests, but later in *Haygood v. Younger*, 718 F.2d 1472, 1478 (9th Cir. 1983), in an Eighth Amendment context, said that distinctions between liberty and property were unimportant. The Eleventh Circuit, in both *Gilmere v. City of Atlanta*, 737 F.2d 894, 951 (11th Cir. 1984) and *Wright v. City of Ozark*, 715 F.2d 1513, 1516 (11th Cir. 1983), implied that even reckless disregard would not invoke due process protection, unless a substantive constitutional right had been violated.

ies. The victims' estates sued under § 1983; however, the court held that negligence, or even gross negligence, in a rescue attempt did not state a due process violation under the Fourteenth Amendment, and remanded the case with instructions to dismiss the action. *Id.* at 1206.

In *Davidson*, a prisoner was attacked by another prisoner who had previously threatened him. Although Davidson informed prison officials of the threat, he admitted to attaching little significance to it. Prison officials took no steps to protect him. 752 F.2d at 819.

The prisoner in *Davidson* was foreclosed from recovery under state law; therefore, he sued in federal district court claiming a violation of due process and invoking § 1983. Based on its interpretation of *Parratt*, the District Court awarded summary judgment in his favor. *Id.* at 817. The Third Circuit sitting *en banc*, however, reversed and directed entry of judgment for defendants. *Id.* at 831.

While concluding that the prisoner did have a liberty interest in not being attacked, the court also held that the prison officials' conduct only constituted negligence, and "negligence claims are not encompassed within § 1983." 752 F.2d at 826. After an extensive review of this Court's § 1983 decisions prior to *Parratt*, the *Davidson* court concluded:

> ...nothing in the Court's cases through [*Baker v. McCollan* in] 1979 provides any support for the principle that negligent conduct by a state official causing injury to a person constitutes a deprivation of a Fourteenth Amendment right which can be redressed in a § 1983 suit.

Id. at 825.

Upon examining *Parratt*, the *Davidson* court acknowledged that, standing alone, some language in the opinion, *see* 451 U.S. at 534-35, could be interpreted as concluding that mere negligence can constitute a deprivation redressable in a § 1983 action. 752 F.2d at 826. Viewing this

language, however, in the context of this Court's prior decisions involving § 1983, the *Davidson* court concluded that *Parratt* did not so hold. *Id.*

While the *Davidson* court declined to prescribe a litmus test for determining which factual situations would support § 1983 claims, the court did discern a pattern from earlier cases involving that statute. After discussing a variety of cases[2] from other circuits, the court concluded that actions may be brought in federal court under § 1983 when there has been infringement of a liberty interest by "intentional conduct, gross negligence or reckless indifference, or an established state procedure." 752 F.2d at 827, 828.

> The essential element of a § 1983 action is abuse by a state official of his or her official position ....
>
> When the only finding is that of mere negligence, as here, we cannot find the "outrageousness" or abuse of official power that warrants raising the tortious conduct of the [defendant] to the level of a deprivation of constitutional right within the scope of § 1983.

Id. at 827, 829 (citations omitted).

Respondent believes, as did the *Davidson* court, that *Parratt* did not explicitly reverse this Court's earlier decisions which indicate that more than mere negligence is required to sustain a § 1983 claim. Since mere negligence is the sole basis for petitioner's § 1983 claim, respondent urges that the " 'outrageousness' or abuse of official power" that might warrant raising the deputy sheriff's

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[2] *E.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (established state procedure); *Stokes v. Delcambre*, 710 F.2d 1120 (5th Cir. 1983) (jail administered in a manner virtually indifferent to prisoners' safety); *Wade v. Haynes*, 663 F.2d 778 (8th Cir. 1981), *aff'd on other grounds sub nom. Smith v. Wade*, 461 U.S. 30 (1983) (deliberate or reckless indifference to prisoner's safety); *Black v. Stephens*, 662 F.2d 181 (3d Cir. 1981), *cert. denied*, 455 U.S. 1008 (1982).

conduct to the level of deprivation of a constitutional right is lacking. *Davidson*, 752 F.2d at 829. *See also Parratt*, 451 U.S. at 549 (Powell, J., concurring) (Section 1983 "enacted to deter real *abuses* by state officials in the exercise of governmental powers" [emphasis in original]).

Respondent believes that petitioner did not suffer a deprivation of a constitutionally protected interest, and therefore suggests that nothing has occurred to trigger an inquiry as to what process is due. Petitioner's status as a jail inmate is not a sufficient reason to relax the standards by which constitutional deprivations are judged.

C. *Petitioner's Status As a Jail Inmate Does Not Justify Relaxing The Standard Of Conduct Necessary To Support A Section 1983 Claim.*

Underlying petitioner's position is the apparent assertion that his status as a jail inmate somehow modifies the parameters within which § 1983 claims are analyzed. A prisoner, however, should not be afforded greater rights and legal remedies by virtue of his incarceration than an ordinary citizen would receive in a similar situation. Certainly this Court has never suggested such a proposition.

In *Paul*, the Court hypothesized that a bystander shot by a policeman or injured by a sheriff driving a government vehicle would not necessarily have a claim under § 1983. 424 U.S. at 698. Similarly, in *Estelle v. Gamble*, the Court concluded that medical malpractice does not become a constitutional violation "merely because the victim is a prisoner." 429 U.S. at 106. An injury should not warrant a § 1983 claim just because the tortfeasor is a state official and the victim is an inmate.

In the present case, petitioner slipped and fell on pillows and newspapers left on some jail stairs by a deputy sheriff. Such an injury could befall any ordinary citizen. Had respondent negligently left trash on the stairs of a citizen's apartment building, that citizen probably would not have an actionable § 1983 claim for any resulting injury. *See Paul*, 424 U.S. at 701; *Estelle*, 429 U.S. at 106; *Baker*, 443 U.S. at 146. Petitioner seemingly would not be able to recover under § 1983 as an ordinary private citizen, and should not be afforded any special legal remedies because of his incarceration in a local jail.

D. *The Court Is Urged To Clarify The Requirements To Be Met For Stating A Due Process Violation Cognizable Under Section 1983 To Be That The Injury Resulting From State Action Must Be The Result Of Official Action Constituting Something More Than Mere Negligence And That The State Remedy Is Inadequate.*

The Court should clarify that the adequacy or inadequacy of a state remedy is only a secondary requirement for recognition of what constitutes a constitutional tort claim under 42 U.S.C. § 1983. The Court should specify that a plaintiff, to maintain an action under § 1983, must first demonstrate that the injury was the result of something greater than mere negligence.

In *Parratt*, the Court set forth two requirements to state a § 1983 action: "(1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." 451 U.S. at 535. The Court, of course, held that procedural due process was not violated as long as there was an adequate state remedy. *Id.* at 543. Petitioner believes that the Court should clarify its earlier decisions[3] and state that despite the adequacy or inadequacy of the state remedy, a violation of a substantive due process right is required to invoke procedural due process protection under the Fourteenth Amendment. Only injuries which are the result of willful or recklessly indifferent abuses of official position by state officials should constitute substantive violations of the Due Process Clause. Allowing claims based only upon simple negligence to reach federal court via a procedural due

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[3] *Paul v. Davis*, 424 U.S. 693; *Estelle v. Gamble*, 429 U.S. 97; and *Baker v. McCollan*, 443 U.S. 137 all imply that something greater than mere negligence in a tort-type action is required to maintain an action for alleged deprivation of due process.

process argument would result in "any meaningful separation between federal and state jurisdiction" ceasing to hold, and "forum shopping" becoming "the order of the day." *Roy v. City of Augusta, Maine*, 712 F.2d 1517, 1523 (1983).

Respondent believes that the Court must establish a requirement of willful or recklessly indifferent official action to invoke federal protection under the Due Process Clause and § 1983, or risk opening the federal courts to a plethora of simple tort actions, which the states, in consideration of their own sovereign interests, have chosen to limit.

III. THE COMMONWEALTH OF VIRGINIA PROVIDES AN ADEQUATE POSTDEPRIVATION REMEDY FOR THE ALLEGED NEGLIGENT DEPRIVATION OF PETITIONER'S LIBERTY INTEREST NOTWITHSTANDING THE DOCTRINE OF SOVEREIGN IMMUNITY.

In *Parratt*, this Court held that the Due Process Clause of the Fourteenth Amendment is not violated when a public employee, by means of a random and unauthorized act, negligently deprives an individual of property, provided the state makes available an adequate post-deprivation remedy. In *Hudson*, this Court extended the *Parratt* analysis to cases involving the intentional deprivation of property by a public employee by means of a random and unauthorized act.

In the event that this Court decides that the alleged tortious injury suffered by petitioner through the negligence of respondent constitutes the deprivation of a liberty interest which is protected by the Fourteenth Amendment, there does appear to be a logical reason why the *Parratt* analysis should not apply to the negligent deprivation of a liberty interest as well as a property interest. *See, e.g., Thibodeaux v. Bordelon, supra; Augustine v. Doe, supra; Gilmere v. City of Atlanta, supra.* Petitioner does not argue that the *Parratt* analysis should not apply to the negligent deprivation of a liberty interest. Brief for Petitioner 26-28. Petitioner also does not dispute that Virginia's tort law would allow him to file suit against respondent in state court.

Although the *en banc* court of appeals did not reach the question of whether the existence of a possible sovereign immunity defense should permit the case to be maintained under § 1983, 748 F.2d at 232, respondent believes that it would be appropriate for this Court to consider the matter since it has a great impact on when a state remedy is "adequate" for purposes of *Parratt*.

If the due process analysis set forth in *Parratt* and extended by *Hudson* was intended to clarify for potential

plaintiffs and the federal courts when certain cases may proceed under § 1983 and when other cases may not, the intended clarification will not be achieved in most instances until guidance is provided regarding when a state remedy is "adequate" for purposes of *Parratt*. Petitioner insists that if sovereign immunity were determined to apply to the present case in a state court action, then petitioner would have no adequate, meaningful remedy. Brief of Petitioner, 29-30. Petitioner relies upon dictum in the *en banc* decision in *Davidson v. O'Lone* for the argument that sovereign immunity necessarily negates a meaningful remedy. 752 F.2d at 822.[4]

Petitioner contends that because sovereign immunity may prevent petitioner from receiving actual compensation from respondent for petitioner's injury, this means that petitioner has no state court remedy. Respondent contends that if the argument that "no actual compensation" always constitutes "no remedy," then *Parratt* and *Hudson* may have very limited utility in referring to state courts most cases based on the deprivation of protected interests by the random and unauthorized acts of a public employee. After all, sovereign immunity is not the only affirmative defense which prevents an injured party from

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[4]The United States District Court for the Eastern District of Virginia has reached the contrary conclusion in four recent cases. *Groves v. Cox*, 559 F. Supp. 772 (E.D. Va. 1983) (negligent deprivation of property; held that, notwithstanding possible availability of bar of sovereign immunity, state's postdeprivation remedies provide plaintiff the opportunity for a fair hearing and therefore adequately comply with procedural due process requirements); *Holmes v. Wampler*, 546 F. Supp. 500 (E.D. Va. 1982) (negligent deprivation of liberty interest; held that bar of sovereign immunity available to defendants would not entail that Virginia state courts had accorded insufficient procedural due process protections); *Frazier v. Collins*, 544 F. Supp. 109 (E.D. Va. 1982) (negligent deprivation of property; held that availability of immunity to defendants would not render Virginia's postdeprivation remedies inadequate or unmeaningful); *Irshad v. Spann*, 543 F. Supp. 922 (E.D. Va. 1982) (negligent deprivation of property; held that possibility of a sovereign immunity defense for defendants would not deprive plaintiff of due process in the state courts).

receiving actual compensation in a state court action. The doctrine of contributory negligence also would prevent an injured party from receiving actual compensation in a Virginia court. *See Chesapeake & Ohio Railway Co. v. Butler*, 179 Va. 609, 611, 20 S.E.2d 516, 518 (1942) (plaintiff is not entitled to recover where plaintiff so far contributed to his injury by his own negligence that but for such negligence the injury would not have occurred). If, in the present case, the petitioner sued in state court and was found contributorially negligent and, thus, received no compensation, would his state remedy be inadequate? In other words, if "no actual compensation" invariably equates with "no adequate remedy," then *Parratt's* analysis will have very limited application since it would appear that nearly every state cause of action, under certain facts and circumstances, might yield no actual compensation for an injured party. Surely this was not what this Court intended in deciding *Parratt*.

Respondent contends that petitioner has misconstrued the meaning of the Due Process Clause of the Fourteenth Amendment. Petitioner erroneously argues that the failure of a plaintiff in a state court action to receive full compensation for the deprivation of a protected interest by the random and unauthorized act of a public employee invariably means that the state court remedy is inadequate for purposes of the Fourteenth Amendment and *Parratt*. Instead, the court of appeals panel in the present case was correct when it stated that under *Parratt* the minimum requirements of procedural due process are met when state law provides the injured party the opportunity for a hearing before a court or other tribunal with the power to grant a remedy. *Daniels*, 720 F.2d at 797.

Petitioner does not dispute that he is entitled under Virginia law to bring a suit against respondent based on simple negligence. If respondent were then to claim an affirmative defense such as sovereign immunity or contributory negligence, petitioner would at the very least receive *the opportunity for a hearing* in the state court on

whether the affirmative defense applied. This opportunity for a hearing appears to be all that is required under the analysis of *Logan v. Zimmerman Brush Co., supra.* As this Court noted in *Logan*, due process does not necessarily entitle "every civil litigant to a hearing on the merits in every case." *Id.* at 437.

The decisions in *Parratt* and *Hudson* acknowledge that a state cause of action may be entirely adequate to satisfy due process even though the state remedy will not provide a plaintiff all of the relief which he might have received if he had been allowed to proceed under § 1983. *Parratt*, 451 U.S. at 543-544; *Hudson*, 468 U.S. at ___, 82 L.Ed.2d at 406.

The more difficult question is to determine when a state remedy, which provides less relief than § 1983 due to a state law affirmative defense, is adequate for the purposes of *Parratt* and the Due Process Clause of the Fourteenth Amendment. Petitioner appears to believe that the question is fully answered by the rather simplistic statement that "no actual compensation" necessarily equals "inadequate remedy." Respondent, on the other hand, contends that the better answer will be found in the decisions by this Court testing the same or similar state law affirmative defenses against the requirements of due process in the context of a state law cause of action.

In the case of *Martinez v. California*, 444 U.S. 277 (1980), this Court considered a claim that a state statute which granted absolute immunity to parole officers violated the Due Process Clause of the Fourteenth Amendment. After considering whether the immunity statute could be viewed as a deprivation of a property interest, this Court held,

> But even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting

> the individual citizen from state action that is wholly arbitrary or irrational.

Id. at 282. This Court then determined that in the particular case before them, the immunity statute rationally furthered a reasonable policy and, thus, there was no merit to the appellants' contention that the immunity statute was unconstitutional when applied to defeat appellants' tort claim arising under state law. *Id.* at 283.

Respondent contends that the analysis of *Martinez v. California* regarding when a state law immunity or defense, within the context of the state tort law, violates due process is the correct analysis to be used in determining under *Parratt* whether a state law remedy is adequate and meaningful. If the state law defense or immunity, within the context of the particular case, is "wholly arbitrary or irrational," then the state law remedy will be inadequate for the purposes of *Parratt*. On the other hand, if the state law defense or immunity is not arbitrary or irrational, then the state remedy will be deemed to be adequate and meaningful.

If the analysis of *Martinez* is not applied to the question of whether a state remedy is adequate under *Parratt*, it is probable that many, if not most, cases which *Parratt* and *Hudson* indicate should be heard in state court will still be filed in federal court if the injured parties can find any "blemishes" on the available state remedies. Without the "bright line" analysis of *Martinez*, it will be very difficult for the federal courts to properly discern whether § 1983 should be available to the injured parties. As in the present case, the federal courts would have to construe and forecast the applicability of the intricacies of affirmative defenses such as sovereign immunity.

If petitioner is correct in arguing that the potential sovereign immunity defense in this case necessarily negates the state remedy because petitioner will not receive the same compensation as he would receive under § 1983, it is very difficult to judge where this argument

ceases as it winds its way through the various affirmative defenses and other procedural and substantive impediments which have developed in our system of state laws during the past two centuries. As noted above, if petitioner is correct, the possibility of a contributory negligence defense should also make the state remedy inadequate for purposes of *Parratt*. After all, a plaintiff, who may have suffered injury proximately caused by the defendant's negligence, would receive no compensation in state court if he were found to have contributed to his injury, whereas if the case had been tried in federal court under § 1983, the award of compensation likely would have been different. Arguably, the same rationale would apply to the doctrine of comparative negligence since a plaintiff would not receive full compensation for his injuries if he was partially at fault.[5]

Indeed, if any affirmative defense were to be construed to make the state remedy inadequate if the compensation granted by the state court were less than the compensation which would have been received under § 1983, then there is no end to the potential pitfalls in state court which may be deemed to make the available state remedy inadequate under *Parratt*. Under this analysis, the existence of a shorter statute of limitations in the state action than in a parallel § 1983 action may be sufficient to classify the state remedy as inadequate. Indeed, taken to its logical conclusion, this argument may conclude that if the state rules of pleading and practice were more onerous and less flexible than the Federal Rules of Civil Procedure, then the state remedy might be construed as inadequate.

Respondent contends that the "hair-splitting" endemic to petitioner's argument is not required by the Due Pro-

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[5] *See Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973) where the state court ruled that when both plaintiff and defendant are at fault in causing injury to plaintiff, plaintiff's recovery from defendant will be reduced to the extent that plaintiff's own negligence proximately caused his injury.

cess Clause of the Fourteenth Amendment. If the "bright line" rule of *Martinez v. California* were applied to the question of when a state remedy is adequate, then the federal courts would have a clear guide for determining when cases which fall under the *Parratt* analysis should be dismissed because of the existence of an adequate state remedy.

Respondent further argues that state law affirmative defenses which are not arbitrary or irrational are not inconsistent with the purpose of § 1983 as interpreted by this Court in cases such as *Procunier v. Navarette, supra.* In *Procunier,* this Court recognized that prison officials, under certain circumstances, may claim a qualified "good faith" immunity in § 1983 cases. While respondent is not arguing that the federal qualified immunity is a mirror image of the state sovereign immunity, the results are often the same in that injured plaintiffs are not compensated and public officials are protected from liability for their negligence.

IV. EVEN IF THE SOVEREIGN IMMUNITY DEFENSE IS AVAILABLE IN THE PRESENT CASE, THE DEFENSE IS NOT WHOLLY ARBITRARY OR IRRATIONAL WITHIN THE CONTEXT OF THIS CASE.

In *Martinez*, this Court upheld the absolute immunity of parole officers because the statute rationally furthered a reasonable state policy. 444 U.S. at 283. In the present case, respondent argues that if a state court were to determine that respondent was entitled to sovereign immunity, the application of sovereign immunity in this case would not be wholly arbitrary or irrational.

In two recent cases, the Virginia Supreme Court raised proper reasons for maintaining a limited sovereign immunity. In *Hinchey v. Ogden*, 226 Va. 234, 307 S.E.2d 891 (1983), the Virginia court noted that sovereign immunity tends to protect the state from "burdensome interference with the performance of its governmental functions." *Id.* at 240, 307 S.E.2d at 894. In *Messina v. Burden*, 228 Va. 301, 321 S.E.2d 657 (1984), the Virginia court noted that sovereign immunity furthers the important state concerns of whether citizens will readily accept public jobs and whether officials will be unafraid to act. *Id.* at 308, 321 S.E.2d at 661.

The concerns raised by the Virginia Supreme Court in defense of some form of limited sovereign immunity are very similar to the concerns raised by this Court in discussing the federal qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), in which this Court stated that the "expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office" are costs to society as a whole. *Id.* at 814.

It is important to bear in mind that Virginia's sovereign immunity is not absolute in the case of officials such as respondent. If respondent had acted intentionally in injuring petitioner, sovereign immunity would not be

available. *See Elder v. Holland*, 208 Va. 15, 19, 155 S.E. 2d 369, 372-373 (1967) ("a state employee may be held liable for his intentional torts"). As this Court noted in *Hudson*, the holding in *Elder* clearly indicates that public employees "do not enjoy sovereign immunity for their intentional torts." *Hudson*, 468 U.S. at ___, 82 L.Ed. 2d at 409.

In light of the holdings in *Martinez* and *Harlow v. Fitzgerald*, respondent argues that it is clear that the limited form of sovereign immunity which may be claimed by a defendant such as respondent in a Virginia court is not wholly arbitrary or irrational.

V. CONCLUSION

Respondent requests that this Court rule that the personal injury which petitioner, an inmate in the Richmond City Jail, allegedly suffered due to the negligence of respondent, a deputy sheriff, does not rise to the level of a protected liberty interest and, thus, does not state a cause of action under 42 U.S.C. § 1983.

This is a case in which petitioner has a remedy provided by the laws of the Commonwealth of Virginia. Respondent asks this Court to rule that a state cause of action is adequate for purposes of due process if the plaintiff would be provided with an opportunity for a hearing before a tribunal with the power to grant a remedy. Respondent further asks this Court to rule that any affirmative defense, such as sovereign immunity, which may be raised in the state court proceeding does not make the state remedy inadequate unless the affirmative defense, within the context of the case, is wholly arbitrary or irrational. The respondent prays that this Court rule that respondent's potential immunity defense, if available, is not wholly arbitrary or irrational.

Therefore, respondent prays that this Court affirm the judgment of the court of appeals and dismiss this case.

Respectfully submitted,

JAMES WALTER HOPPER
Gardner, Moss & Hopper, P.C.
629 East Main Street
P. O. Box 1201
Richmond, VA 23209
804-643-2500

Counsel for Respondent